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No. 03-756

In the Supreme Court of the United States

GONZALO BARRIENTOS, *et al.*,
Appellants,
v.
STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

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QUESTION PRESENTED

Whether the district court properly denied Appellants' motion for injunctive relief to prevent the Texas Senate from considering or voting upon a congressional redistricting bill without first submitting the existing internal legislative procedures of the Senate to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

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In the
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On Appeal from the United States District Court for the Southern District of Texas

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

The relief sought by Appellants in the court below—an injunction prohibiting the Legislature from considering or adopting any congressional redistricting plan prior to Department of Justice preclearance of the Texas Senate's internal procedures—is today fundamentally irrelevant. Accordingly, pursuant to Supreme Court Rule 18.6, the State of Texas, Texas Governor Rick Perry, and Texas Lieutenant Governor David Dewhurst (collectively "the State") move to dismiss this appeal on the ground that it is moot, for four separate reasons.

First, the legislative sessions in question, the Second and Third Called Sessions of the 78th Texas Legislature, have expired. *Second*, the Legislature has already passed, and the Governor has already signed into law, congressional redistricting. Indeed, primary elections have already occurred under that plan, and candidates are busy campaigning for the general election. *Third*, Appellants' questions presented are hypothetical, never became ripe, and are now moot, because there was never in fact a special procedure in the Texas Senate made applicable only to redistricting.

And *fourth*, and most critically, after enactment, the congressional redistricting plan was in fact submitted to the Department of Justice, and, on December 19, 2003, the Department precleared the plan in its entirety. Thus, the only relief Appellants could have conceivably obtained—submission for Department of Justice preclearance—has already occurred.

In the alternative, the State moves to summarily affirm the judgment rendered by the three-judge court on the ground that the questions presented are so insubstantial as not to warrant further argument. SUP. CT. R. 18.6. Appellants alleged that the Texas Senate impermissibly altered its "2/3 Rule" with respect to congressional redistricting and that that alteration required prior preclearance by the Department of Justice. The court below correctly rejected that claim. As a matter of law, (1) there was no "2/3 Rule" in the Texas Senate, (2) the Senate's practices did not change, and (3) even had the State of Texas both had such a Rule and changed it during the course of redistricting, that change would not require preclearance because the change was not "enacted" and is not a change "affecting voting" within the meaning of the Voting Rights Act of 1965, under this Court's direct holding in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). Moreover, the Department of Justice expressly determined that the internal legislative procedures used to consider redistricting did not themselves require prior preclearance, and that determination is entitled to "considerable deference" by the courts.

STATEMENT OF THE CASE

The Jurisdictional Statement substantially mischaracterizes the events leading up to the enactment of congressional redistricting legislation in 2003. *See* J.S., at 2-9.[1] Appellants' entire argument is predicated on an alleged change to a "2/3 Rule" of the Texas

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1. Appellants' Jurisdictional Statement will be cited as "J.S."

Senate, yet nowhere do the Texas Senate Rules require a supermajority vote to pass a redistricting bill.[2] *See* TEX. S. RULE 16.08(4)-(5) (App., at 37a). Indeed, the Jurisdictional Statement is bereft of *any* citation to *any* textual reference that even alludes to a supermajority requirement in the context of redistricting legislation.[3] The only provisions of the Texas Constitution cited by Appellants expressly require supermajorities only for other, wholly unrelated actions taken by the Senate as a body.[4] *See* J.S., at 8 n.3.

A. The Senate Rules Contain No "2/3 Rule."

This litigation arose after Texas Governor Rick Perry convened a Second Called Session of the Texas Legislature commencing on July 28, 2003. Instead of conducting the business of the State of Texas as they were elected to do, that same day, eleven Senators

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2. As a matter of terminology, when Appellants' Jurisdictional Statement uses the proper noun "Rules," it rarely is referring to the actual Senate Rules that govern the Texas Senate, but rather to "rules" in the generic sense. For example, the Jurisdictional Statement says that "the State changed the Rules" in the course of redistricting, *see* J.S., at 3, but in fact no changes were made to the Senate Rules.

3. The absence of such a textual basis is especially significant because the Senate Rules provide that, as a matter of state law, those Rules and the Texas Constitution are "the only requirements binding on the Senate, notwithstanding any other requirements expressed elsewhere in statute." TEX. S. RULES, preamble (App., at 29a).

4. The U.S. Constitution contains similar two-thirds requirements for specified Senate votes. *See* U.S. CONST. art. I, §7 (to override a veto); *id.*, art. II, §2 (to ratify a treaty); *id.*, art. V (to propose an amendment). These provisions have never been interpreted as requiring a two-thirds vote for the U.S. Senate to pass legislation generally, or to require a supermajority vote of the U.S. Senate to take actions that are wholly unrelated to those expressly specified.

fled to New Mexico, denying a quorum and shutting down the Texas Senate.

During this Second Called Session, Lieutenant Governor David Dewhurst—the President and presiding officer of the Texas Senate—stated that he would not attempt to place a so-called "blocker bill" ahead of other legislation. Under ordinary Texas Senate Rules, Senators consider bills on the Senate floor in the order that they emerge from committee. *See* TEX. S. RULE 5.12 (App., at 33a). That is the Senate's regular order of business. To consider a bill "out of its regular calendar order," the rules require that two-thirds of the Senators present must agree to suspend the regular order of business. *See* TEX. S. RULE 5.13 (App, at 33a).

In the past, an inconsequential bill has often—though not always—been filed by a Senator early in the legislative session. The Lieutenant Governor may then choose quickly to refer it to a committee, so that it can be voted out by that committee and placed atop the Senate's intent calendar, which determines order of business on the floor. *See* TEX. S. RULE 5.12 (App., at 33a). Because the Senate Rules provide that bills will be placed on the order of business in the order in which they are voted out of committee, having such a bill at the top of the intent calendar forces lawmakers who wish to take up another bill either (1) to vote out or otherwise dispose of the purported "blocker bill" or (2) to obtain support from two-thirds of the Chamber to suspend the regular order of business. This bill atop the calendar is referred to as a "blocker bill" because it blocks any other legislation from being debated unless two-thirds of the Senators present support doing so.[5]

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5. Additionally, there is an exception to the calendar Rules described above, unmentioned by the Appellants, pertaining to House Bills. Because the Senate's regular order of business places all House bills at the back of the line, behind both any "blocker bill" and any other

This tradition has not always been followed in the Texas Senate and, in fact, there have been numerous occasions when various Lieutenant Governors have declined to use a "blocker bill" during a Called Session.[6] Nevertheless, Appellants contend that having to vote to suspend the "regular order of business" is, in every instance, the regular order of business in the Texas Senate. *See* J.S., at 4. But the use of a "blocker bill" is not grounded in, much less mandated by, any constitutional or statutory provisions or Rules enacted by the Texas Senate, nor is it used by the Texas House. It is purely a legislative calendar-management tool sometimes utilized through the discretion of the Lieutenant Governor, committee members, and other Senators to control the flow of legislation to the Senate floor and to manage the day-to-day affairs of the Senate. No one person alone may control the use of a blocker bill: its use depends on (1) a Senator's introducing a bill intended to be used as a blocker; (2) the Lieutenant Governor's quickly referring the bill to committee; (3) the committee's quick reporting of the bill; and

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Senate Bills, the Senate Rules provide for "House bill days" on Wednesday and Thursday of each week during which House bills have priority. TEX. S. RULE 5.10 (App., 32a). On those House bill days, "House Joint Resolutions and House bills on special order and on second and third readings, respectively, and House Concurrent Resolutions shall be taken up and considered until disposed of . . . ." *Id.* Thus, on such a House bill day, all Senate bills—including any Senate blocker bill—are at the back of the line. *Id.*; *see also* App., at 40a.

6. Several examples of the Texas Senate proceeding to a vote in a special session without having in place a "blocker bill" are contained in the Affidavit of Patsy Spaw, Secretary of the Texas Senate. *See* App., at 41a. In particular, the examples in that affidavit reflect the state of the Texas Senate in the 55th, 57th, 59th, and 63rd Texas Senate, *id.*—both immediately before and immediately after the 1972 reference date for Texas under the Voting Rights Act.

(4) the Lieutenant Governor's and Senate's continuing to decide not to take up the "blocker bill" for a vote.

While in New Mexico, on August 11, 2003, Appellants filed this §5 enforcement claim alleging that Lieutenant Governor Dewhurst's decision not to pursue the use of a "blocker bill" concerning congressional redistricting was a violation of §5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *See* J.S., at 7a-25a.

B. The Department of Justice Determined That Internal Legislative Procedures Do Not Require Preclearance.

On August 15, 2003, the State asked the Department of Justice for clarification pursuant to 28 C.F.R. §51.35 (App., at 12a) as to whether preclearance was required before the Senate could act without using a "blocker bill." App., at 1a-11a. That submission also, in the alternative, presented that practice to the Attorney General for expedited preclearance. *Id.*, at 2a, 10a-11a.

On August 26, 2003, the Attorney General responded that "the practice in question is an internal legislative parliamentary rule or practice—not a change affecting voting—and, therefore, is not subject to the preclearance requirement of Section 5." App., at 13a. The Attorney General continues, "[W]hen a new redistricting plan is actually adopted by the Texas Legislature . . . the Attorney General will review the entire proposed plan *and the process by which it has been adopted* to ensure that the submitted changes have neither a discriminatory purpose nor a discriminatory effect." *Id.*, at 14a (emphasis added).

C. The Three-Judge Court Dismissed Appellants' Claims.

Following extensive briefing and argument, the district court declined to grant the injunction requested by Appellants and instead dismissed their claims. J.S., at 1a-4a. The three-judge court concluded that "[t]he United States Supreme Court decision in *Presley v. Etowah County* . . . controls this case" because

Appellants challenged only the internal "distribution of power between legislators," which only indirectly affects voting. J.S., at 2a. "In the instant case, what will directly affect the voters of this State is a redistricting bill, not the mere consideration of such a bill or the process by which it comes to the floor of the Texas Senate." J.S., at 2a.[7]

D. The Texas Legislature Enacted Congressional Redistricting.

After the three-judge court denied their injunction, Appellants sought no interim relief from this Court. Instead, when the Governor called a Third Called Session, they returned to the floor of the Texas Senate to debate congressional redistricting.

Following extensive and often heated debate, the Texas Legislature passed, and Governor Perry signed into law, a congressional redistricting plan, which originated not as a Senate

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7. Although the district court dismissed Appellants' then-pending §5 and related claims, it expressly withheld ruling on their pending motion to amend their Complaint to assert additional constitutional claims. J.S., at 3a-4a; *accord* App., at 21a (Appellants: noting that "[u]ntouched by the Court's September 12th order was the Senator's [sic] motion for leave to file a first amended complaint"). Therefore, Appellants' September 22, 2003, notice of appeal was interlocutory, specifying that it challenged only the three-judge court's September 12, 2003, denial of a preliminary injunction. *See* J.S., at 5a-6a; *accord* App., at 21a (Appellants: "The Senators appealed the preliminary injunction denial on September 22, 2003, and filed their jurisdictional statement with the Supreme Court of the United States on November 21, 2003.").

It was not until January 22, 2004—long after the notice of appeal in this case—that the district court denied as moot Appellants' motion to amend and entered a final judgment. App., at 25a-28a. Appellants filed no notice of appeal from that final judgment, and consequently the only issue properly before this Court is the denial of the preliminary injunction.

bill, but rather in the House as H.B. 3.[8] A companion House bill, H.B. 1, also changed election dates "to allow for the use of the districts established by [H.B.3], in the 2004 general primary election . . . ."[9] Pursuant to the Governor's call of the Legislature, *see* TEX. CONST. art III, §40, the Texas Senate also considered a number of other subjects during the Third Called Session, succeeding in enacting several of them into law. Included among these were H.B. 2, which modified Texas law regarding the construction of highways and other traffic laws, and H.B. 7, which provided for reorganization of certain agencies of state government.[10]

E. The Department of Justice Precleared the Texas Congressional Redistricting Legislation.

After enactment, the State submitted the congressional redistricting legislation for preclearance, and, on December 19, 2003, the Department of Justice precleared the legislation in its entirety. App., at 16a-17a.

ARGUMENT

I. THE QUESTIONS PRESENTED ARE NOW MOOT.

The three-judge court correctly denied Appellants' request for an injunction under §5 of the Voting Rights Act. J.S., at 1a-4a; *see also* Part II, *infra*. Nevertheless, this appeal should be dismissed as moot because it no longer presents a live controversy.

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8. Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 2, Art. 1-3, 2003 Tex. Sess. Law Serv. 3.

9. Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 1, §6, 2003 Tex. Sess. Law Serv. 2.

10. *See, e.g.*, Act effective Jan. 11, 2004, 78th Leg. 3d C.S., ch. 8, Art. 1-6, 2003 Tex. Sess. Law Serv. 115; Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 3, Art. 1-34, 2003 Tex. Sess. Law Serv. 78.

A. The Second and Third Called Sessions of the 78th Texas Legislature Have Already Expired.

Appellants' claims are moot because they seek to alter the procedures to be used in sessions of the Texas Legislature that have already passed into history. The Complaint was filed during the Second Called Session of the 78th Legislature and was litigated in terms of what was expected to happen during an anticipated Third Called Session. On September 12, 2003, the district court denied Appellants' request for an injunction, and Appellants sought no emergency relief from this Court pending appeal.

Thereafter, the Governor did, in fact, call a Third Called Session on September 15, 2003. Under the Texas Constitution, special sessions are limited by law to a maximum term of thirty days, *see* TEX. CONST. art. III, §40; its work done, the Texas Senate ended the Third Called Session on October 12, 2003. Because both sessions have expired, Appellants' claims for injunctive relief concerning the procedures in place in the Second and Third Called Sessions are now moot.

B. The Case Is Moot Because Redistricting Legislation Has Already Been Enacted, and Elections Have Already Occurred.

Appellants' claims challenged the legislative procedures in place for the consideration of congressional redistricting and sought injunctive relief against those legislative procedures that they found objectionable. In particular, Appellants' sought an affirmative injunction to prevent congressional redistricting from being considered at all on the floor of the Senate. *See* J.S., at 23a-24a.

But congressional redistricting has already passed. It was debated, voted out of committee, approved by the House, approved by the Senate, and signed by the Governor. It has already gone into effect, and primary candidates have already won and lost under the new plan.

At this stage—after redistricting has been considered, debated, and adopted—a claim for injunctive relief against the initial consideration of redistricting by the Texas Senate is altogether moot.[11]

C. Ultimate Preclearance of the Redistricting Legislation Necessarily Moots Any §5 Controversy That May Have Existed.

The Department of Justice has made two important determinations in this case, the first of which is entitled to "considerable deference" on the merits and the second of which is entirely controlling and renders this appeal moot.

On August 26, 2003, the Department, in response to a request for clarification pursuant to 28 C.F.R. §51.35 (App., at 12a), squarely addressed the gravamen of Appellants' claim. The Attorney General concluded that the decision whether or not to use a "blocker bill" is "an internal legislative parliamentary rule or practice—not a change affecting voting—and, therefore, is not subject to the preclearance requirement of Section 5." App., at 13a.

The Attorney General's determination that the Texas Senate's use of a "blocker bill" *vel non* does not require §5 preclearance is entitled to "considerable deference." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-179 (1985) ("[T]he

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11. Nor is this case one where traditional notions of mootness and ripeness should be subordinated to concerns that the claim is capable of repetition yet evading review. Both the Department of Justice and a three-judge federal district court have already reviewed and upheld the legality of the ultimately-passed plan and the processes used to adopt that plan. *See* App., at 14a, 16a-17a; *Session v. Perry*, 298 F. Supp.2d 451 (E.D. Tex. 2004) (three-judge court). And the possibility that this dispute might occur again in the future is utterly speculative. *See Texas v. United States*, 523 U.S. 296, 300 (1998) (holding that a §5 claim was not yet ripe because "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all").

construction placed upon [§ 5 of the Voting Rights] Act by the Attorney General . . . is entitled to considerable deference."); *see also* Part II.D, *infra*.

In its August 26 decision letter, the Department expressly noted that "when a new redistricting plan is actually adopted by the Texas Legislature . . . the Attorney General will review the entire proposed plan *and the process by which it has been adopted* to ensure that the submitted changes have neither a discriminatory purpose nor a discriminatory effect." App., at 14a (emphasis added).

Hence, the second relevant determination by the Department of Justice occurred on December 19, 2003. At that time—after the congressional redistricting plan had been considered, debated, adopted, and submitted for preclearance—the Department of Justice determined that the "plan and the process" did not retrogress minority voting rights and so precleared the plan in its entirety. App., at 14a, 16a-17a.

Unlike the Department's August 26 determination, which is entitled merely to "considerable deference," the December 19 preclearance—of both the "plan and the process"—is entirely conclusive.[12]

Once the Attorney General has made a determination of non-retrogression under §5, the Voting Rights Act provides no role for the courts to second-guess that determination. *Morris v. Gressette*, 432 U.S. 491, 507 (1977) ("[That decision] cannot be questioned in a suit seeking judicial review of the Attorney General's exercise of

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12. Indeed, there is an argument that, under the plain terms of the statute, any §5 claim with respect to the "2/3 Rule" became moot even earlier—60 days after the State's initial August 15 submission, once the Attorney General declined to interpose an objection. *See* 42 U.S.C. §1973c ("[S]uch . . . practice . . . may be enforced . . . if the . . . practice . . . has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . .") (J.S., at 27a).

discretion under § 5."); *id.*, at 503, 504-05; *Allen v. State Board of Educ.*, 393 U.S. 544, 549-50 (1969).

Even if they had prevailed in the district court, the only remedy Appellants could have obtained was an injunction requiring the State to obtain Department of Justice preclearance. That preclearance having been already granted, this case is moot.

D. Appellants' Questions Presented Never Became Ripe, and Are Now Moot, Because There Was Never a Special Procedure in the Texas Senate Made Applicable Only to Redistricting.

Both Questions Presented in the Jurisdictional Statement explicitly presume that a change in internal legislative rules was applicable "solely to [congressional] redistricting legislation." *See* J.S., at i. In accord with that focus, Appellants throughout the Jurisdictional Statement base their argument—including their supposed distinctions of leading cases—on the assertion that the practice they are challenging "applied only to this year's controversial Texas congressional redistricting bill." J.S., at 2; *see also* J.S., at 3 ("only applicable to congressional redistricting legislation"); *id.*, at 8 ("only the rules governing the process for enacting *congressional redistricting* legislation") (emphasis in original); *id.*, at 11 ("solely applicable to redistricting"); *id.*, at 13 ("*the change was made applicable only to congressional redistricting*") (emphasis in original); *id.*, at 14 ("changes applicable only to redistricting"); *id.*, at 15 ("targeted solely to congressional redistricting legislation"); *id.*, at 17 ("changes to redistricting practices and procedures"); *id.*, at 18 ("aimed specifically and solely at congressional redistricting legislation"); *id.*, at 20 ("its . . . only effect, is enactment of a congressional redistricting plan").

But this prediction never came true, and consequently Appellants' claims were unripe then and moot today. *See, e.g., Texas*, 523 U.S., at 300 (holding §5 challenge not ripe because it was uncertain whether particular rule would actually be invoked);

Alexander v. City of Pearland, 945 F. Supp. 1069, 1070 (S.D. Tex. 1996) (refusing to issue §5 injunction or even request three-judge court because the enactment in question was not finalized and thus "the Court is unpersuaded that there is a justiciable issue under section 5").

A wide variety of legislation was considered prior to the expiration of the Third Called Session, and the Senate's calendar rules applied evenhandedly to all of it. The Senate calendar had no "blocker bill" applicable to *any* of the legislation that the Senate considered. Nor was a supermajority otherwise required for the passage of the bills considered during that session. Among the other laws enacted during the session were bills affecting the construction of highways and bills that provided for reorganization of several agencies of state government. *See, e.g.*, Act effective Jan. 11, 2004, 78th Leg. 3d C.S., ch. 8, Art. 1-6, 2003 Tex. Sess. Law Serv. 115; Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 3, Art. 1-34, 2003 Tex. Sess. Law Serv. 78. The Appellants' fears that the Senate would use a special procedure applicable "solely to redistricting legislation," as suggested in the Questions Presented, proved unfounded. J.S., at i.[13]

This appeal therefore hinges on a counterfactual premise about how the Third Called Session was conducted. Thus, even were this Court now to adjudicate what would happen if a rule change were made "solely applicable to redistricting," J.S, at 11, that guidance would be merely advisory to the parties because the 78th Texas Legislature did no such thing. For all these reasons, this Court should dismiss the appeal as moot.

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13. Moreover, their supposition that a Senate "blocker bill" would necessarily prevent the consideration of redistricting without a 2/3 majority also proved incorrect, as the bill that ended up passing in the Third Called Session was a House bill, which can come up for Senate consideration independently of any pending Senate "blocker bills." *See* note 5, *supra*.

II. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD SUMMARILY AFFIRM.

If the Court were to reach the merits of this appeal, it should summarily affirm the denial of the injunction and the dismissal of Appellants' claims because: (1) Texas does not have a "2/3 Rule"; (2) the procedures under which the Senate considers bills have not changed; (3) any change in the Senate Rules, had one occurred, would be internal to a legislative body, not an "enactment," and not "with respect to voting" under the Voting Rights Act; and (4) the Attorney General's conclusion that such internal practices fall outside of the preclearance process is entitled to "considerable deference," and his subsequent determination that the Texas redistricting plan did not retrogress minority voting rights is conclusive.

A. Texas Does Not Now Have, and Has Never Had, a "2/3 Rule" with Respect to Redistricting Legislation.

Under §5 of the Voting Rights Act, preclearance is required only if a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting [is] different from that in force or effect on November 1, 1972." 42 U.S.C. §1973c. In order to determine whether there has been such a change, one must compare the current practice with the practice in place at the time the State became covered by the Voting Rights Act. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992) ("To determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted."). In Texas, the relevant date for comparison is November 1, 1972—the date that Texas became a covered jurisdiction under the Voting Rights Act. 42 U.S.C. §1973b(b).

Appellants have consistently maintained a studied ambiguity as to what new Senate "Rule" they are contending must be precleared by the Department of Justice. They have never quoted the text of any such rule, in the Senate Rules or elsewhere. Nor have they pointed to any uniform practice, before or after 1972.

Specifically, in order to state a claim, Appellants must have alleged facts showing (1) what practice was in existence on November 1, 1972, and (2) what current changed practice they are challenging. The Appellants did neither. The Appellants never clearly stated what practice they were challenging, alternatively focusing on "blocker bills" and various other legislative supermajority requirements (which they sometimes refer to as the "2/3 Rule"). But neither requirement clearly existed in Texas in 1972. The terms "blocker bill" and "2/3 Rule" appear nowhere in the Senate Rules or Texas Constitution, in general or in the specific context of redistricting. They do not exist.

B. Senate Practice Has Not Changed.

Appellants' failure to point to a specific practice or procedure that was in force or effect on November 1, 1972, the relevant date for determining whether there has been a change in procedure, also means that they failed to demonstrate that any Senate practice has changed.

The Senate did use "blocker bills" with some frequency before 1972, but never *required* that a "blocker bill" be used before considering any legislation, much less redistricting legislation in particular. For example, prior to 1972, "blocker bills" were not used in the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature. *See* App., at 41a. Because the Senate did not have a "blocker bill" during those Sessions, the Senate needed no 2/3 vote in order to suspend the regular order of business. Bills were simply considered consecutively in the order in which they were voted out of committee. *Id.*

Furthermore, even on those occasions when a "blocker bill" may have been used, a failure to get a two-thirds majority to suspend the regular order has not precluded the Senate from disposing of "blocker bills" so that another desired bill could be taken up on a simple majority vote. In 1968, under Lieutenant Governor Preston Smith, an attempt was made to suspend the

regular order of business to bring up H.B. 2, a tax bill, on second reading. *See* App., at 40a. When the motion to suspend failed 14 to 16, the bill was still brought up on a subsequent day without a two-thirds suspension vote. *Id.* Similarly, bills that might otherwise have served as "blocker bills" were disposed of in 1961 to allow passage of legislation relating to the Texas Liquor Control Act to be taken up without a two-thirds vote. *Id.*

In the years following 1972 until today, the same intermittent use of "blocker bills" has occurred. No blocker bills were used in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, or the First Called Session of the 63rd Legislature, and consequently no two-thirds vote to suspend the order of business was taken. App., at 41a.

Historically, because redistricting can be so politically divisive, it often fails to pass during the regular biennial session of the Texas Legislature, instead necessitating a special called session of the Legislature.[14] The Texas Legislature meets for a 140-day "regular session" only once during its two-year term. *See* TEX. CONST. art. III, §§5(a), 24(b). Any other meeting of the Legislature requires that it be called into "special session" by proclamation of the Governor. *Id.*, art. III, §§5(a), 40. In such a special session, "there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling such session, or presented to them by the Governor; and no such session shall be of longer duration than thirty days." *Id.*, §40. Given that limited scope and limited duration, as Appellants' expert below expressly acknowledged, a "blocker bill . . . is often not used in [s]pecial [s]essions." J.S., at 37a.

Indeed, although use of a blocker bill has varied, from the 1971 congressional redistricting until the present, never has a final

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14. In 2003—as in 1971, 1981, and 1991—the regular session of the Texas Legislature did not pass congressional redistricting legislation, but a special session of the Legislature did. J.S., at 48a-51a.

congressional redistricting map been favored by two-thirds of the Senate, but instead each time was ultimately favored by merely a majority.[15] In 1971, the Texas Senate approved the final redistricting map—after it returned from a conference with the House—by a vote of 17 in favor, 9 opposed, and one "paired vote."[16] In 1981, the Texas Senate approved the final redistricting map by a vote of 18-13.[17] In 1991, the Texas Senate passed redistricting legislation by a vote of 18-13. J.S., at 50a. And in 2003, the ultimate redistricting-related legislation passed by votes of 19-12 (election date changes) and 17-14 (district boundary changes).[18]

In sum, Appellants have not pointed to any change in the practices and procedures of the Senate before or after 1972. Under Senate practice, the use of "blocker bills" was allowed, but not required, under Senate Rules prior to 1972 and is allowed, but not required, under the Senate Rules today.

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15. That there was not a supermajority in support of the final congressional redistricting plan in 1971, 1981, and 1991 is all the more remarkable because, in those years, the Texas Senate was dominated by a single political party that held more than two-thirds of the seats. In 1971, the Senate had 29 Democrats and 2 Republicans. In 1981, the Senate had 23 Democrats and 7 Republicans. And in 1991, the Senate had 22 Democrats and 8 Republicans. *See* Members - Session Statistics for the Texas Legislature, *on file with* Texas Legislative Reference Library.

16. *See* Act effective Sept. 3, 1971, 62d Leg., 1st C.S., ch. 12, §§1-30, 1971 Tex. Gen. Laws 38, 41.

17. *See* Act effective Nov. 10, 1981, 67th Leg., 1st C.S., ch. 2, Art. 1-4, 1981 Tex. Gen. Laws 37, 42.

18. *See* Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 1, §§1-7, 2003 Tex. Sess. Law Serv. 1, 3; Act effective Jan. 11, 2004, 78th Leg., 3d C.S., ch. 2, Art. 1-3, 2003 Tex. Sess. Law Serv. 3, 77.

C. The Procedures Were Not "Enacted" and Are Not "With Respect to Voting."

The panel below correctly concluded that the Appellants presented an "insubstantial" claim because any change that occurred is not one "with respect to voting." The decision not to utilize a "blocker bill" is not a voting qualification or prerequisite to voting for the general electorate, nor a standard, practice, or procedure with respect to voting for the general electorate.

This Court has held that §5 "is unambiguous with respect to the question of whether it covers changes other than changes in rules governing voting. It does not." *See Presley*, 502 U.S., at 509. In *Presley*, this Court held that changes that concern only the routine, internal operations of an elected body and the distribution of power among officials are not subject to §5 because such changes have no direct relation to, or impact on, voting by the electorate. *See id.*, at 506. As the panel below noted, *Presley* "controls this case." App., at 2a. Under *Presley*, the decision not to utilize a "blocker bill" is not a covered change that falls under §5, and therefore did not require preclearance.

As *Presley* explained, §5 is triggered by changes in standards, practices or procedures that actually pass, *i.e.*, that are formally adopted by a Legislature or other governmental body.[19] The Lieutenant Governor's discretionary decision not to attempt to place a "blocker bill" ahead of other legislation in the Texas Senate is not such a change. That is because the Voting Rights Act protects *voters*, not *legislators*, and in particular the ability of voters to exercise their vote. Changes in voting practices and procedures are

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19. Appellants attempt to distinguish *Presley* primarily on the ground that *Presley* did not involve a "change [that] was *made applicable only to congressional redistricting*." J.S., at 13 (emphasis in original). Of course, neither was the procedure at issue in this case; the choice not to employ a "blocker bill" applied uniformly to all legislation considered during the Third Called Sesssion, including matters completely unrelated to redistricting. *See* Part I.D, *supra*.

not able to affect the ability of voters (as opposed to legislators) to vote until they are actually enacted. In the absence of a legislative enactment, §5 is generally not triggered because the rights of voters are not affected. As the panel below properly held, "what will directly affect the voters of this State is a redistricting bill, not the mere consideration of such a bill or the process by which it comes to the floor of the Texas Senate." App., at 2a.

Appellants assert a change in the unwritten and informal deliberative tactics used strategically by legislators from time to time. But such tactics simply do not come within the ambit of the Voting Rights Act. By its terms, Section 5 applies only when "a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. §1973c.

Shifting tactics within the legislative arena cannot fairly be described as the State "enact[ing] or seek[ing] to administer" a change. *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 264 (2003). As the Court made clear in *Lopez v. Monterey County*, 525 U.S. 266 (1999), the word "seek" in the context of §5 should be

> "understood as creating a temporal distinction. The Government has indicated that a covered jurisdiction need not seek preclearance before *enacting* legislation that would effect a voting change. Preclearance is required before actually *administering* a change, however, and use of the word 'seek' in § 5 makes this distinction clear." *Id.*, at 279 (emphasis in original) (internal cites omitted).

This "temporal" distinction excludes from preclearance those matters preliminary to the final act that effects the change in voting. Thus, the preliminary strategies employed by legislators on the Senate floor are not covered "enact[ments]" of legislation—they are merely preliminary to legislation, not "the product of legislation." *Branch*, 538 U.S. at 264.

Indeed, the statute dovetails with the Department of Justice's promulgated policy of refusing to consider submissions before they become "final enactment[s] or administrative decision[s]." 28 C.F.R. §51.22(a) (App., at 15a); *see also Lopez*, 525 U.S., at 279 (citing 28 C.F.R. §51.22(a)). In short, a State does not seek to administer a change until that changed has been enacted.

There are a myriad of legislative decisions—which Senators are named committee chairs, to which committees bills are referred, which Senators are recognized on the floor, which parliamentary procedures are employed to advance or hinder a bill's passage—that are carried out daily in every legislature. Many, if not most, of these decisions will have some impact at some point on whether or not a particular redistricting plan is adopted. They do not trigger §5 because, under *Presley*, they affect merely the internal governance of the elected body, not the rights of individual voters. Any contrary ruling could essentially shut down the state legislature in Section 5-covered states, as literally thousands of decisions would have to be submitted to the Department of Justice for preclearance. This Court roundly rejected such an outcome in *Presley*. As this Court explained, the term "voting" in §5 cannot reach into every internal crevice of government because:

> "in a real sense every decision taken by government implicates voting. This is but the felicitous consequence of democracy, in which power derives from the people. Yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision." *Id.*, at 504.

Or as one federal district judge explained:

> "It is true that changes in the various legislative delegations' rules might affect the distribution of power among officials and certain officials might have more or less authority after the changes. It is also true that the value of a citizen's vote may be diminished when his elected representative has less

> authority. Nevertheless, *the Supreme Court has clearly, unmistakably and explicitly held that such changes in internal rules and procedures do not raise a Voting Rights Act preclearance issue.*" *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1302-03 (N.D. Ga.) (emphasis added), *aff'd in part, rev'd on other grounds*, 276 F.3d 1244 (CA11 2001).

For the Act to have a meaningful boundary, the scope of "voting" must be confined to final legislative acts that directly affect voting by the general population.

Because the pre-enactment strategies of particular legislators are neither "enact[ments]" nor can they be said to be "seek[ing] to administer" a change within the text of §5, they fall outside of the preclearance requirement.[20] Each enactment should be precleared exactly once—after it is final—to maximize efficiency for all concerned, allowing the Attorney General to focus his review on

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20. Appellants offer two hypotheticals that they believe present more compelling circumstances than the facts in this case. *See* J.S., at 15-16. First, they suppose an express Texas constitutional amendment, altering the rules for a legislative quorum for the single purpose of considering congressional redistricting. This hypothetical indeed does present a stronger case, because it avoids three of the four merits failings of Appellants' argument. In their hypothetical—unlike in Appellants' case in reality—(1) there was a prior rule (the old constitutional language), (2) there was a change (the new constitutional language), and (3) there was an actual enactment (the passage of the new language). However, even their hypothetical is still not "with respect to voting" because it concerns legislators, not voters, and so under *Presley* still would not require preclearance.

Their second hypothetical supposes a statute that would specify that the votes of minority members of the Texas Senate should not be counted in certain circumstances. This "admittedly outlandish" hypothetical, J.S., at 16, is both offensive on its face and decidedly unhelpful. If such a noxious statute were to pass, §5 preclearance would be altogether irrelevant, because the statute would be facially unconstitutional, and no court would hesitate to immediately so hold.

laws in their final form and allowing the normal state legislative process to take its course without undue interference at each step.[21]

In addition, the rule that §5 does not reach the deliberative legislative process is strongly rooted in notions of federalism. As this Court has explained, the Voting Rights Act has never been interpreted to give the Department of Justice broad supervisory authority over the internal operation of state legislatures. "If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments." *Presley*, 502 U.S. at 510.

The unrestrained construction of §5 urged in this lawsuit would radically overhaul the operating procedures of the Texas Senate, by mandating in essence that the President of the Texas Senate (the Lieutenant Governor of Texas) cede to federal authorities control over the daily, internal workings of the Senate, no matter what the governing Senate Rules say. Such an overbroad reading would allow federal law to encroach seriously on the internal governing procedures of a sovereign State and dictate how the Senate calendar and daily flow of legislation through the Chamber is conducted. It is hard to imagine processes more fundamental to the sovereignty of States than the ongoing legislative decisions of which bills to introduce, and when, and which bills to pass, and when. An understanding of the Voting Rights Act that allowed federal courts

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21. Appellants cite *Georgia v. United States*, 411 U.S. 526 (1973), for the proposition that "[t]he redistricting process affects voting because," in part, it affects "the opportunity for [voters] and their elected representatives to express their views on the district." J.S., at 17. But *Georgia* does not involve the political process leading up to a particular redistricting map, instead merely reaching the now-uncontroversial holding that "the changes enacted" must be precleared before implementation. *Georgia*, 411 U.S., at 535. With that the State has no dispute; indeed, that preclearance has been sought and denied. App., at 16a-17a.

to intrude into the sovereignty of a State to the level requested by the Appellants in this case would in effect commandeer the machinery of state government, and would raise constitutional problems with the Voting Rights Act itself. *See Printz v. United States*, 521 U.S. 898, 912 (1997) ("We have held . . . that state legislatures are *not* subject to federal direction." (emphasis in the original)); *New York v. United States*, 505 U.S. 144, 179 (1992) ("No . . . constitutional provision authorizes Congress to command state legislatures to legislate."); *see also Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997) (noting the "serious federalism costs already implicated by §5"). Nothing in this Court's prior caselaw requires or permits such a result.

D. The Department of Justice's Conclusion That the Challenged Practices Do Not Require Preclearance Is Entitled To "Considerable Deference," and Its Subsequent Preclearance of the "Plan and the Process" Behind Congressional Redistricting Is Conclusive.

Even if *Presley* had not held that the Voting Rights Act unambiguously excludes claims such as those asserted by Appellants, the result of this appeal should still be summary affirmance because, as the panel below observed, the Department of Justice's interpretation of §5 is entitled to "considerable deference." App., at 3a. In *Presley*, the Court did not reach the question of administrative interpretation because Congress's intent to exclude internal rules from the scope of §5 was unambiguous. *Presley*, 502 U.S., at 508-09. But if the Court reaches that question here, the Department of Justice has squarely and specifically indicated that no preclearance would be required on these facts.

Before the three-judge court's decision, the Department of Justice determined that the subject matter of this suit was not subject to preclearance. *See* App., at 13a-14a. On August 26, 2003, the Attorney General concluded that "the practice in question [in the Texas Senate] is an internal legislative parliamentary rule or practice—not a change affecting voting—and, therefore, is not subject to the preclearance requirement of Section 5." App., at 14a.

The Attorney General's conclusions are entitled to considerable deference. In interpreting the scope of §5, this Court has "traditionally afford[ed] substantial deference to the Attorney General's interpretation of § 5 in light of [his] 'central role . . . in formulating and implementing' that section." *Lopez*, 525 U.S., at 281 (quoting *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32, 39 (1978)); *see also Presley*, 502 U.S., at 509 ("When the Attorney General makes a reasonable argument that a contested change should be classified as a change in a rule governing voting, we can defer to that judgment."); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985) ("Any doubt that these changes are covered by § 5 is resolved by the construction placed upon the Act by the Attorney General, which is entitled to considerable deference."); *Perkins v. Matthews*, 400 U.S. 379, 390-91 (1971).

Against this express determination from the Attorney General, Appellants attach a cryptic "printout" purporting to show previous submissions similar to that at issue here. J.S., at 9, 20; *id.*, at Exh. B. To the extent the content and meaning of this printout can be determined at all—and Appellants proffered no evidence before the district court concerning the context or meaning of the many ambiguous entries—the fact that some jurisdictions may have chosen out of an abundance of caution to submit some procedures for preclearance does not demonstrate that such procedures are actually covered by §5. Indeed, no submission discussed by Appellants appears to relate to a change in the rules of a state legislature (and certainly none show a submission by members of that legislature asking whether they can follow existing rules).

In support of their "printout," Appellants cite *Georgia v. United States*, 411 U.S., at 527-28. However, in *Georgia*, unlike here, the Attorney General contended that the type of change—the actual enactment of a redistricting plan—was covered. In such a situation, the Court looked in part to the Georgia's own prior submission of such a plan to indicate that Georgia understood that its enactment of redistricting was a covered change. *Id.*, at 533-34. That situation

is a far cry from the instant case, wherein the Attorney General has determined that there has been no covered change, *see* App., at 14a, and wherein Texas did not submit the change for preclearance without first seeking clarification under 28 C.F.R. §51.35, *see* App., at 1a. Appellants have no basis to argue that the Court should look to a cryptic "printout" to override the express conclusion of the Attorney General—and the clear guidance of this Court—that rules internal to a legislative body are not subject to preclearance.

In any event, once the plan was enacted, the Attorney General reviewed the Texas entire "plan and process" for compliance with the Voting Rights Act, and on December 19, 2003, ruled that the Texas plan was not retrogressive. App., at 16a. In so doing, the Attorney General considered and expressly rejected Appellants' arguments, including their argument that the process used to pass the bill violated the Voting Rights Act. And that preclearance determination is conclusive as a matter of law. *Morris v. Gressette*, 432 U.S. 491, 507 (1977).

E. The District Court Correctly Dismissed Appellants' Section 2 and Constitutional Claims.

In its September 12, 2003, decision, the district court also dismissed Appellants' "claims under §1983, insofar as Plaintiffs claim that the State's decision to consider redistricting legislation and the failure to adhere to the '2/3rd Rule' violate the First, Fourteenth, and Fifteenth Amendments to the United States Constitution." J.S., at 3a. The district court's decision not to grant an injunction on the basis of those theories was correct because they were meritless and substantially interrelated with the §5 issues.[22]

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22. In a single footnote of their Jurisdictional Statement, Appellants suggest that their "Section 2 and constitutional claims" should not have been dismissed "without even affording [them] the right to an evidentiary

Indeed, the district court dismissed those claims only "insofar as" they touched on those overlapping issues. *See* J.S., at 3a.

The merits of a congressional redistricting bill—including its compliance with Section 2 of the Voting Rights Act and with the Constitution—were left for a future court challenge to the final legislation itself. *See* J.S., at 3a ("[It] would thereafter be subject to judicial challenge. However, that time has not yet come.").

The proper forum for such a challenge came *after* the enactment of the final redistricting legislation on October 12, 2003. That same day, an action was filed in the Eastern District of Texas bringing such challenges. In the consolidated trial that followed, dozens of plaintiffs—many closely allied with Appellants and represented by substantially the same counsel—brought a panoply of claims against the substance of and process leading up to congressional redistricting.

After substantial briefing and a two-week trial, the district court denied all the Voting Rights Act and constitutional claims brought against the Texas congressional redistricting legislation. *See Session v. Perry*, 298 F. Supp.2d 451, 515 (E.D. Tex. 2004) (three-judge court). A number of plaintiffs have filed notices of appeal to this Court, and it is expected that they will file Jurisdictional

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hearing." J.S., at 9 n.5. This argument lacks merit. Appellants did not request more time for discovery or the presentation of evidence, through a Rule 56(f) affidavit or otherwise. Had they done so, the district court would have been well within its discretion in denying that request because these claims have no legal basis. Nor have they presented the question in this appeal. It is not within the scope of the Questions Presented. *See* J.S., at i; *see also* SUP. CT. R. 18.3, 14.1(a). And if it had been presented, the ultimate question of dismissal would not fall within this Court's interlocutory jurisdiction over three-judge court injunctions because Appellants failed to preserve the issue on appeal. 28 U.S.C. §1253; *see also* note 7, *supra*.

Statements shortly. Although the State believes that those appeals, too, will warrant summary affirmance, it is only those appeals—and not the pending Jurisdictional Statement in the present case—that provide an appropriate vehicle to consider the merits of the substance of and process behind Texas's redistricting legislation.

The subject matter of the present appeal, by contrast, is merely the propriety of the district court's denial of the preliminary injunction sought before the Third Called Session. It does not provide a record on which to resolve any disputes about the merits of Texas's redistricting plan or the method by which it was ultimately adopted—both of which came to fruition *after* the district court decision challenged in this appeal. *See* J.S., at 5a-6a (appealing only the September 12, 2003 decision).

CONCLUSION

The Court should dismiss the appeal as moot or, in the alternative, summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

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March 2004

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Appendix A

Geoffrey S. Connor
ASSISTANT SECRETARY OF STATE
State of Texas

Mr. Joseph D. Rich
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Voting Section, 1800G
Washington, D.C. 20530

Re: Applicability of Section 5 of Voting Rights Act

Dear Mr. Rich:

The State of Texas seeks clarification pursuant to 28 C.F.R. §51.35 as to whether a discretionary decision by the Texas Lieutenant Governor not to (1) attempt to place a so-called "blocker bill" ahead of other legislation or (2) otherwise require a two-thirds supermajority vote to take up congressional redistricting legislation on the floor of the Senate during this Second or any subsequent Called Session is a change "with respect to voting" that requires preclearance under Section 5 of the Voting Rights Act of 1965, as amended. As discussed herein, the State of Texas does not believe that any such parliamentary and operational decision—one that concerns the internal, day-to-day working of the Texas Senate—is subject to Section 5 preclearance.[1] In short, there is no "two-thirds

[1] Of course, the State of Texas does not dispute that in the event a redistricting plan is passed by the Legislature, the actual redistricting plan itself would be subject to prelearance and would be submitted.

rule," the Senate practice has not changed, and, in any event, the procedures are not "with respect to voting." However, should the United States Department of Justice disagree, then please accept this letter as the State's written request for expedited administrative preclearance, pursuant to 28 C.F.R. §51.34.

Facts

Texas Governor Rick Perry convened a Second Called Session of the Texas Legislature commencing on July 28, 2003, for the purpose of considering legislation relating to: (1) congressional redistricting; (2) certain transportation-related issues; (3) state finance issues, including adjustments to school district fiscal matters; (4) certain election-related issues; and (5) reorganization and reform measures applicable to state government. This Second Called Session ends by law on August 26, 2003.

During this Second Called Session, Lieutenant Governor David Dewhurst—the President and presiding officer of the Texas Senate—has declared that he will not attempt to place a "blocker bill" ahead of other legislation. Under ordinary Texas Senate rules, Senators consider bills on the Senate floor in the order they emerge from committee. *See* TEX. S. RULE 5.12 (Texas Senate Rules, at Attachment A). That is the Senate's regular order of business. To debate a bill "out of its regular calendar order," the rules require that two-thirds of the Senators present must agree to suspend Rule 5.12 in order to consider the bill. *See* TEX. S. RULE 5.13. In the past, an inconsequential bill has often—though not always—ben filed by a Senator early in the legislative session. The Lieutenant Governor may then quickly refer it to a committee, so that it can be voted out by that committee and placed atop the Senate's intent calendar, which determines its order of business on the floor. Because the Senate Rules determine the order of business, and provide that bills will be placed on the order of business in the order in which they are voted out of committee, having such a bill at the

top of the intent calendar forces lawmakers either (1) to vote out or otherwise dispose of the purported "blocker bill" or (2) to obtain support from two-thirds of the Chamber to suspend the regular order of business and take up another bill first. This bill is often referred to as a "blocker bill" because it blocks any other legislation from being debated unless two-thirds of the Senators present support doing so.

This tradition has not always been followed in the Texas Senate and, in fact, there have been numerous occasions when various Lieutenant Governors have declined to use a "blocker bill" during a Called Session. It should be noted that the "blocker bill" is not grounded in, much less mandated by, any constitutional or statutory provisions or rules enacted by the Texas Senate, nor is it used by the Texas House. It is purely a legislative calendar-management tool utilized through the discretion of the Lieutenant Governor, committee members, and other Senators to control the flow of legislation to the Senate floor and to manage the day-to-day affairs of the Senate. No one party alone may control the use of a blocker bill: its use depends on (1) a Senator's introducing a bill intended to be used as a blocker; (2) the Lieutenant Governor's quick referral of the bill to committee; (3) the committee's quick reporting of the bill; and (4) the Lieutenant Governor's and Senate's ongoing decision not to take up the "blocker bill" for a vote.

Blocker bills have been used inconsistently by the Texas Senate. Legislation has been passed many times without the use of either a blocker bill or a two-thirds supermajority vote both before and after November 1, 1972. *See* Affidavit of Patsy Spaw, Secretary of the Senate (Attachment B)

On August 11, 2003, 11 of the State's 31 Senators ("the Laredo plaintiffs") filed a Section 5 enforcement claim in federal district court in Laredo, Texas on the erroneous assumption that the Texas Lieutenant Governor's decision not to utilize a "blocker bill" or

otherwise require a two-thirds supermajority vote before taking up congressional redistricting legislation on the floor of the Senate during this Second Called Session violates Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c, *et seq.*[2] The State of Texas believes that this decision is not subject to preclearance under Section 5.

Argument

Senate Procedures Are No Different than Those in Place on November 1, 1972

Section 5 of the Voting Rights Act requires preclearance of any "voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting," that is "different from that in force or effect on November 1, 1972." 42 U.S.C. §1973c. Preclearance is not necessary in this case, because Senate rules and procedures affecting the use of so-called "blocker bills" have not changed since 1972.

Under Senate Rule 5.12, bills are considered on second reading "in the order in which the committee reports on them." Under Rule 5.13, bills may be taken out of order when "the regular order is suspended by a vote of two-thirds of the members present." A bill may be described as "blocker bill" when it (1) is the first bill voted out of committee and therefore first on the regular order of business; and (2) is informally understood by the Senate and the Lieutenant Governor as a bill on which no action is to be taken. In that case, the Senate must suspend the regular order of business in order to bring subsequent bills on the floor.

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[2] Civil Action No. L:03CV113; *Barrientos v. State of Texas*; In the United State District Court for the Southern District of Texas, Laredo Division (Attachment C).

The Senate used "blocker bills" on occasion before 1972, but has never *required* that a "blocker bill" be used. *See* Affidavit of Patsy Spaw, Secretary of the Senate (Attachment B). For example, prior to 1972, "blocker bills" were not used in the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature. *Id.* In those Sessions, the Senate did not recognize a "blocker bill" and therefore did not suspend the regular order of business by a two-thirds vote. Bills were considered consecutively in the order in which they were voted out of committee. *Id.* Even when a "blocker bill" may have been used, a failure to get a two-thirds majority to suspend the regular order has not precluded the Senate from disposing of "blocker bills" so that the desired bill could be taken up on a simple majority vote. As noted in the affidavit, in 1968, under Lieutenant Governor Preston Smith, "an attempt was made to suspend the regular order of business to bring up H.B. 2, a tax bill, on second reading." When the motion to suspend failed 14 to 16, the bill was still brought up on a subsequent day "without a two-thirds suspension vote." *Id.* Similarly, bills that might otherwise have served as "blocker bills" were disposed of in 1961 to allow passage of legislation relating to the Texas Liquor Control Act to be taken up without a two-thirds vote.

The same intermittent use of "blocker bills" existed after 1972. *Id.* No blocker bills were used in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, or the First Called Session of the 63rd Legislature, and no two-thirds vote to suspend the order of business was taken. *Id.* Consequently, it appears that the use of "blocker bills" was allowed, but not required, under Senate Rules prior to 1972 and is allowed, but not required, under the Senate Rules at this time.

The Decision to Utilize a So-Called "Blocker Bill" Concerns Only Internal Operating Procedures

The Supreme Court of the United States has stated that Section 5 "is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting. It does not." *See Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1972). In *Presley*, the Court held that changes that concern only the routine, internal operations of an elected body and the distribution of power among officials are not subject to Section 5 because such changes have no direct relation to, or impact on, voting. *See id.* at 506. In light of this on-point ruling, it is beyond serious dispute that the decision not to utilize a "blocker bill" is not a covered change that falls under Section 5, and therefore does not require preclearance.

The obvious impact of the Lieutenant Governor's discretionary decision not to attempt to place a "blocker bill" ahead of other legislation in the Texas Senate is that a bill may be passed, pursuant to the Senate Rules, by a simple majority of 16 Senators instead of a two-thirds supermajority of 21 Senators.

The Laredo plaintiffs' arguments are fundamentally flawed because, *inter alia*, they ignore the requirement that changes be "with respect to voting." As *Presley* explained, Section 5 is triggered by changes in standards, practices or procedures that actually pass, *i.e.*, that are formally adopted by a Legislature or other governmental body. That is because the Voting Rights Act protects *voters*, and the ability of voters to actually vote. And only those changes that pass are able to affect the ability of voters (as opposed to legislators) to vote. Until something passes, Section 5 is not triggered because the rights of voters are not affected. There are a myriad of legislative decisions—which Senators are named committee chairs, to which committee bills are referred, which Senators are recognized on the floor, which parliamentary

procedures are employed to advance or hinder a bill's passage—that are carried out daily in every legislature, but they do not trigger Section 5 because, under *Presley*, they affect merely the internal governance of the elected body, not the rights of individual voters.

Other federal court decisions make it clear that an internal distribution of power among an elected body's officials is not covered by Section 5. *See Holley v. City of Roanoke*, 149 F. Supp. 2d 1310, 1313 (M.D. Ala 2001) (change in city council's decision-making process for appointing school board members did not require prelearance); *Bonilla v. City of Council of City of Chicago*, 809 F. Supp. 590, 597 (N.D. Ill 1992) (city's requirement that at least ten alderman support a proposed redistricting ordinance before it can be submitted for voter approval is not a standard, practice or procedure under §2 of the Voting Rights Act). Indeed, in reaching its decision, the *Bonilla* court stated the following:

> Since legislatures operate under majority rule principles, requiring a majority of legislators to approve a particular redistricting plan is clearly permissible under the Voting Rights Act. Indeed, the Bonilla Plaintiffs do not even suggest that they could challenge a statutory procedure which allowed a majority of the City Council to approve a redistricting ordinance.

See id. at 596.

Similarly, in *DeJulio v. Georgia*, 127 F. Supp. 2d 1274 (N.D. Ga 2001), *aff'd in part, rev'd in part on other grounds*, 276 F.3d 1244 (2001), the court held that Section 5 did not apply to changes in internal rules and procedures by which the Georgia State Legislature enacted local legislation. *See id.* at 1300-02. In so doing, the court opined that:

> Based on the precedent of *Presley*, this Court must conclude that preclearance was not required in this case. It is true that

> changes in the various legislative delegations' rules might affect the distribution of power among officials and certain officials might have more or less authority after th change. It is also true that the value of a citizen's vote may be diminished when his elected representative has less authority. Nevertheless, the Supreme Court has *clearly, unmistakably and explicitly* held that such changes in internal rules and procedures do not rise a Voting Rights Act preclearance issue.

See id. at 1301-02 (emphasis added).

Moreover, the court recognized that principles of federalism dictate this logical result:

> Furthermore, the Voting Rights Act has never been interpreted as giving the Department of Justice broad supervisory authority over the internal operation of state legislatures. "If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments."

See id. at 1302 (quoting *Presley*, 502 U.S. at 510).

The unrestrained construction of Section 5 urged in the Laredo lawsuit would radically overhaul the operating procedures of an elected governmental body, in essence mandating that the President of the Texas Senate (the Lieutenant Governor of Texas) cede to federal authorities near-complete control over the daily, internal workings of the Senate, no matter what the governing Senate Rules say. Such an overbroad reading would allow federal law to seriously encroach on the internal governing procedures of a sovereign State and dictate how the Senate calendar and daily flow of legislation through the Chamber is conducted. It is hard to imagine processes more fundamental to the sovereignty of States

than the ongoing legislative decisions of which bills to introduce, and when, and which bills to pass, and when.

Indeed, to state the relief sought by the Laredo plaintiffs is to realize its overbreadth. If a court were to rule in their favor, the court would presumably issue an injunction that the Texas Senate may not consider redistricting legislation unless: (1) a Senator first introduces separate legislation, a "blocker bill," (2) the Lieutenant Governor immediately refers it to committee, (3) the committee passes the bill before any other legislation is passed, and (4) the Senate refrains from passing the "blocker bill" once it comes to the floor. The process would be nothing short of a federal court's writing and imposing procedural rules for a state legislature governing the introduction and passage of legislation and requiring a two-thirds vote before redistricting legislation can ever be voted on. A federal injunctive order that intruded into the sovereignty of a State to that level, and that in effect commandeered the machinery of state government in such a manner, would raise very serious constitutional problems that could threaten the Voting Rights Act itself. *See Printz v. United States*, 521 U.S. 898, 912 (1997) ("We have held . . . that state legislatures are *not* subject to federal direction." (Emphasis in the original)); *New York v. United States*, 505 U.S. 144, 179 (1992) ("No . . . constitutional provision authorizes Congress to command state legislatures to legislate."); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (noting the "serious federalism costs already implicated by §5").

The informal agreement to place a "blocker bill" atop the Senate calendar is simply that—an informal agreement—sometimes used, sometimes not. But any determination that this internal operational arrangement somehow implicates Section 5 would depart drastically from governing precedent and slide down a slippery slope that would empower federal officials with almost limitless authority to micromanage a range of what are quintessentially state legislative judgments.

The United States Supreme Court has considered similar arguments before—though none quite so remarkable as those suggested in the Laredo lawsuit—and roundly rejected them. Whether the presiding officer of the Texas Senate chooses to use a "blocker bill" as an internal parliamentary tool to manage the Senate calendar is plainly not a change "with respect to voting" covered by Section 5. A wealth of on-point precedent demonstrates that this parliamentary decision—which concerns "the internal operations of an elected body," *Presley*, 502 U.S. at 503, *not* Texas election law writ large (or small)—in no way triggers scrutiny under the Act.

Covered changes much bear a direct relation to voting itself, and Section 5's coverage simply does not reach a state senate's "internal operating procedures." *Id.* at 504. Section 5 is unambiguous, and the Supreme Court has rejected claims that urge an unconstrained interpretation. The governing law is clear: changes "with respect to voting" are covered and require preclearance; changes "with respect to governance" are not. Finding otherwise would represent federal control over the most core, internal state legislative matters. Since the requirements of Section 5 are inapplicable in this case, the State of Texas requests that the United States Department of Justice confirm in writing that no preclearance is required in this matter.

Alternative Request for Administrative Preclearance

In the unlikely event that the Department believes that the aforementioned decision by the Texas Lieutenant Governor is in fact covered by Section 5,[3] then the State of Texas contends that preclearance should be granted because the decision (1) does not

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[3] Submission of this letter is in no way a waiver of the rights of the State of Texas—and the State expressly preserves its rights—to contest judicially whether the internal procedures of the Texas Senate are subject to Section 5 preclearance.

have a racially discriminatory purpose, (2) will not make minority voters worse off than they were prior to the decision (*i.e.*, the decision is not retrogressive), and (3) does not deny or abridge the right to vote on account of race, color, membership in a language minority group.

As mentioned previously, the current Second Called Session expires on August 26, 2003. Because time is of the essence, this request is appropriate for expedited treatment, pursuant to 28 C.F.R. §51.34. We have attached the absent Senators' complaint (Attachment C). We are not able to attach any documentation to support their claim of a change to a "2/3 Rule"; as noted above, there is no "2/3 Rule," but only an informal agreement about whether and which legislation to introduce and when to pass or not pass that legislation, sometimes observed and sometimes not. The absence of any text of a rule or rule change underlines why this issue is not subject to preclearance.

Should you have any questions regarding this matter, please contact Don Willett, Deputy Attorney General for Legal Counsel at the Office of the Texas Attorney General, at (512) 463-2191.

Very truly yours,

/s/

Geoffrey S. Connor

Appendix B

28 C.F.R. §51.35 Disposition of inappropriate submissions.

The Attorney General will make no response on the merits with respect to an inappropriate submission but will notify the submitting authority of the inappropriateness of the submission. Such notification will be made as promptly as possible and no later than the 60th day following receipt and will include an explanation of the inappropriateness of the submission. Inappropriate submissions include the submission of changes that do not affect voting (see, e.g., § 51.13), the submission of standards, practices, or procedures that have not been changed (see, e.g., §§51.4, 51.14), the submission of changes that affect voting but are not subject to the requirement of Section 5 (see, e.g., § 51.18), premature submissions (see §§ 51.22, 51.61(b)), submissions by jurisdictions not subject to the preclearance requirement (see §§ 51.4, 51.5), and deficient submissions (see § 51.26(d)).

Appendix C

U.S. Department of Justice

Civil Rights Division

RAA:JDR:RAK:TEM:jdh:par
166-012-3
2003-2939

Voting Section - NWB.
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

August 26, 2003

Geoffrey S. Connor, Esq.
Assistant Secretary of State
State of Texas
P.O. Box 12697
Austin, Texas 78711-2697

Dear Mr. Connor:

This letter refers to your recent correspondence in which you request clarification under the Procedures for the Administration of Section 5 (28 C.F.R. 51.35) of whether preclearance is required pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, before the Texas Lieutenant Governor may bring congressional redistricting legislation to the floor of the Senate during the Second or any subsequent Called Session, without having first introduced a so-called "blocker bill" that could be bypassed only by a two-thirds vote to suspend the Senate rules. Your letter takes the position that Section 5 preclearance is not required under these circumstances but asks that this Department

treat your letter as a Section 5 submission if we determine that the practice in question requires Section 5 preclearance. We received your letter on August 15, 2003; supplemental information was received on August 22, 2003, and you have requested expedited administrative consideration pursuant to 28 C.F.R. 51.34.

Our analysis indicates that the practice in question is an internal legislative parliamentary rule or practice – not a change affecting voting – and, therefore, is not subject to the preclearance requirement of Section 5. See Presley v. Etowah County Commission, 502 U.S. 491, 502 (Section 5 does not cover the internal operating procedures of an elected body). Accordingly, no determination by the Attorney General is required or appropriate under Section 5. See 28 C.F.R. 51.2, 51.12, 51.13, and 51.35.

If and when a new redistricting plan is actually adopted by the Texas Legislature, signed into law by the Governor, and submitted to the Attorney General for Section 5 review, the Attorney General will review the entire proposed plan and the process by which it has been adopted to ensure that the submitted changes have neither a discriminatory purpose nor a discriminatory effect. See Georgia v. United States, 411 U.S. 426 (1973); see also 28 C.F.R. 51.52.

Sincerely,

/s/

Joseph D. Rich
Chief, Voting Section

Appendix D

28 C.F.R. §51.22 Premature submissions.

The Attorney General will not consider on the merits: (a) Any proposal for a change affecting voting submitted prior to final enactment or administrative decision or (b) any proposed change which has a direct bearing on another change affecting voting which has not received Section 5 preclearance. However, with respect to a change for which approval by referendum, a State or Federal court or a Federal agency is required, the Attorney General may make a determination concerning the change prior to such approval if the change is not subject to alteration in the final approving action and if all other action necessary for approval has been taken.

Appendix E

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, DC 20035*

December 19, 2003

Honorable Geoffrey S. Connor
Secretary of State
P.O. Box 12060
Austin, Texas 78711-2060

Dear Secretary Connor:

I am writing in reference to your recent submission pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, of (i) Texas House Bill 1, which provides for the extension of the filing period for congressional candidates, changes in the primary election dates, procedures for canvassing, and the allowance of late counting of ballots; and (ii) Texas House Bill 3, which provides the 2003 Congressional Redistricting Plan enacted by the Texas Legislature. We received your initial submission on October 21, 2003, and received supplemental information at various times through December 11, 2003.

The Attorney General does not interpose any objection to the specified changes in House Bill 1 or House Bill 3. We do note, however, that Section 5 provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the

Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.41 and 51.43.

Because the Section 5 status of these changes is of interest to the court in *Session v. Perry*, Civil Docket No. 2:03-CV-354 (E.D. Texas, Marshall Division), we also are providing a copy of this letter to the court.

Sincerely,

/s/

Sheldon T. Bradshaw
Principal Deputy Assistant
Attorney General

cc: Honorable Patrick E. Higginbotham
Honorable T. John Ward
Honorable Lee H. Rosenthal

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, ET AL.,	*	
Plaintiffs,	*	
VS.	*	CIVIL ACTION
	*	NO. L-03-113
STATE OF TEXAS, ET AL.	*	
Defendants.	*	

MEMORANDUM

Plaintiffs have filed a notice of appeal to the United States Supreme Court from the Memorandum and Order of September 12, 2003 (Docket No. 34). In that Memorandum, this Court specifically withheld a ruling on Plaintiffs' motion to file a first amended complaint, indicating that further factual and legal development was necessary. Accordingly, we did not enter a separate order of dismissal at that time, as contemplated by Rules 54(a) and 58(a), Fed. R. Civ. P. Subsequent events appear to have mooted any further action in this case, and the Court now proposes to enter a

separate order closing it. Any comment on this proposal should be submitted no later than November 24, 2003.

DONE this 4th day of November, 2003.

U.S. CIRCUIT JUDGE PATRICK E. HIGGINBOTHAM
CHIEF U.S. DISTRICT JUDGE GEORGE P. KAZEN
U.S. DISTRICT JUDGE LEE H. ROSENTHAL

Appendix G

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. L-03-CV-113
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF SENATORS' RESPONSE TO COURT MEMORANDUM OF NOVEMBER 4, 2003

The eleven plaintiff Senators in the above-referenced matter respond as follows to the Court's Memorandum inquiry of November 4, 2003:

Issue and background

The question raised by the Court in its November 4th Memorandum is whether subsequent events have mooted any further action in this case, including disposition of the still-pending motion for leave to file a first amended complaint. The Senators think not; a live controversy remains.

The Court's memorandum opinion and order of September 12, 2003, denied the Senators' request for a preliminary injunction and dismissed without hearing other constitutional and statutory claims

of the Senators concerning the validity of the Lieutenant Governor's change of the rules governing the Texas Senate. The Senators appealed the preliminary injunction denial on September 22, 2003, and filed their jurisdictional statement with the Supreme Court of the United States on November 21, 2003.

Untouched by the Court's September 12th order was the Senator's motion for leave to file a first amended complaint. In particular, the Court's September 12th disposition did not address the constitutional and statutory issues surrounding the unprecedented threats, fines, and other sanctions imposed by the Lieutenant Governor and a group of Senators on the eleven plaintiff Senators. As highlighted in ¶ 2 of the motion for leave to file the amended complaint, these issues were the focus of the proposed amended complaint. The Court has never reached them.

Live controversy remains, notwithstanding changing fines and sanction to "conditional"

Subsequent to the Court's September 12th ruling, the Texas Senate did act to modify the fines and sanctions; however, it has never lifted them. Instead, the key piece of the Senate's modification made avoidance of the already-imposed fines and sanctions a condition of probation for the plaintiff Senators. The punitive fines and sanctions action, it was determined, would not be imposed as long as the eleven Senators satisfied certain conditions for a certain period into the future. That probationary period has not expired. Thus, the fines and sanctions remain in place, albeit conditionally, and constitute a continuing threat to the plaintiffs' freedom of action and conscience as legislators.

Conditional punishments such as the one that remains in place here burden future conduct of the subjects of the punishments. That the punishment *may* not occur if certain conditions are satisfied means that there are continuing collateral consequences if certain choices are made by those subject to the punishments. The actual

threat of continuing collateral consequences defeats a claim of mootness. *See, e.g., Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968) (continuing burdens flowing from criminal punishment mean that completion of criminal sentence does not moot legal challenge concerning the conviction); *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (actual possibility of future imposition of already-imposed more severe criminal penalty kept challenge from being moot). A case does not become moot simply because a court order redressing an alleged grievance has been obeyed. *See, e.g., Los Angeles County v. Davis*, 440 U.S. 625, 643 (1979). Similarly, this challenge has not become moot simply because the eleven Senators currently are acting in such a way as not to trigger the imposition of otherwise conditional sanctions.

Conclusion

This case is not moot and should be allowed to proceed on the fines and sanctions issue. A Senate determination actually lifting the sanctions and fines entirely - and unconditionally - would moot this case. That there has been an adamant refusal to take such a step is sufficient demonstration that the issues arising from this unprecedented act remain the subject of dispute.

Respectfully submitted,

/s/ Renea Hicks by cz w/ permission
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2003, I served a copy of the foregoing **Plaintiff Senators' Response to Court Memorandum of November 4, 2003**, on the following counsel, by facsimile, and by placing a copy of the same in the United States mail, postage prepaid, to:

Hon. R. Ted Cruz
Solicitor General
P.O. Box 12548
Austin, Texas 7871102548

/s/
Carlos M. Zaffirini, Sr.

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR., FRANK L. MADLA, ELIOT SHAPLEIGH, LETICIA VAN DE PUTTE, ROYCE WEST, JOHN WHITMIRE, and JUDITH ZAFFIRINI, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. L-03-113
STATE OF TEXAS, RICK PERRY, in his official capacity as Governor of the State of Texas, and DAVID DEWHURST, in his official capacity as Lieutenant Governor and Presiding Officer of the Texas Senate, Defendants.	§	

MEMORANDUM AND ORDER

Still pending is Plaintiffs' motion for leave to file an amended complaint. (Docket No. 13) The proposed amended complaint was intended to address fines and other sanctions threatened and/or imposed against the plaintiff Senators at a time when they were deliberately absenting themselves from the Second Special Session of 2003. The amendment first alleged that these sanctions imposed "new qualifications and requirements for holders of elected office," in violation of the Voting Rights Act. Plaintiffs also alleged that the threats violated the due process, equal protection, ex post facto, and bill of attainder clauses of the federal Constitution, as well as the First Amendment. On November 4, 2003, the Court issued a Memorandum seeking comment from the parties on whether subsequent events and litigation had rendered this motion moot (Docket No. 37). Both Plaintiffs (Docket No. 38) and Defendants (Docket No. 39) responded.

On September 18, 2003, the Texas Senate revoked sanctions, including a substantial fine and loss of parking privileges, previously imposed on the Plaintiff senators. Instead, Plaintiffs were placed on probation for a period terminating on January 11, 2005, conditioned on compliance with a "72 hour rule" limiting the senators' ability to absent themselves "without sufficient excuse" from any future proceedings. Although this probationary period remains in effect, the 78th term of the Texas State Senate has closed, and there are no currently scheduled special sessions.

Where Plaintiffs have suffered no injury and the challenged provision's "future effect remains wholly speculative," the claims will be dismissed for lack of ripeness. *Socialist Labor Party v. Gilligan*, 92 S.Ct. 1716, 1720 (1972). Courts deciding ripeness of a particular claim consider both the "fitness of issues for judicial decision" and the 'hardship to the parties of withholding court consideration." *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003)

(citations omitted). These considerations suggest that Plaintiffs' proposed claims in this case are not ripe.

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 118 S.Ct. 1257, 1259 (1998) (internal citations omitted). Given that the Senate has been adjourned until the 2005 session, Plaintiffs are currently facing no hardship. Plaintiffs ask the Court to analogize their penalty to one imposed in a criminal context. Undeniably, criminal defendants may challenge the terms of their supervised release or probation. *See, e.g., U.S. v. White*, 244 F.3d 1199 (10th Cir. 2001); *U.S. v. Loy*, 237 F.3d 251 (3rd Cir. 2001). However, courts have often refused to adjudicate claims arising out of conditions which would not be imposed until some distant date in the future. *U.S. v. Thomas*, 198 F.3d 1063, 1065 (8th Cir. 1999) (finding unripe challenge to release condition that defendant not associate with gang members where defendant had not yet served prison term) ; *U.S. v. McAllister*, 225 F.3d 982, 989-990 (8th Cir. 2000) (finding challenge to condition of release unripe where it would take effect only if appellant was released from in-patient facility); *U.S. v. Dixon*, 538 F.2d 812, 814 (9th Cir. 1976) (finding unripe claim challenging potential extension of prison term if appellant were unable to pay fines in the future).

Media reports indicate that another special session might be called this year to address the issue of school financing. Even if that happens, Plaintiffs' claims would not automatically "ripen." Again, analogizing to the criminal context, the Supreme Court has suggested that courts should consider the "likelihood that the complainant will disobey the law, the certainty that such disobedience will take a particular form, any present injury occasioned by the threat of prosecution, and the likelihood that a prosecution will actually ensue." *Blanchette v. Connecticut General Ins. Corps.*, 95 S.Ct. 335, 358, n. 29 (1974). It is highly speculative that the school-financing issue would provoke another

deliberate quorum-breaking exodus sufficient to trigger the suspended penalties. So long as a quorum existed, the absence of some senators would not likely concern the majority, which would only be strengthened by the absences.

"Unnecessary decisions dissipate judicial energies better conserved for litigants who have a real need for official assistance." 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3521.1 at 114. (2d ed. 1984). This admonition is especially pertinent here, considering the novel nature of Plaintiffs' federal theories, which are based on possible actions of a state governmental body, the validity of which have not even been tested in state courts. *See Texas v. United States*, 118 S.Ct. 1257, 1260 (1998) (". . . . the remoteness and abstraction [of the issues] are increased by the fact that [the challenged provision] has yet to be interpreted by the Texas courts.").

For the foregoing reasons, Plaintiffs' Motion to Amend the Complaint is DENIED. This case shall now be deemed CLOSED.

DONE this 22th day of January, 2004.

U.S. CIRCUIT JUDGE PATRICK E. HIGGINBOTHAM
CHIEF U.S. DISTRICT JUDGE GEORGE P. KAZEN
U.S. DISTRICT JUDGE LEE H. ROSENTHAL

Appendix I

Rules of the Texas Senate
78th Texas Legislature
(excerpts)

STATEMENT OF AUTHORIZATION AND PRECEDENCE

Pursuant to and under the authority of Article III, Section 11, of the Constitution of 1876, as amended, and notwithstanding any other provision of statute, the Senate adopts the following rules to govern its operations and procedures. The provisions of these rules and of the Constitution shall be deemed the only requirements binding on the Senate, notwithstanding any other requirements expressed elsewhere in statute.

* * * * *

ARTICLE V

SENATE PROCEDURAL RULES (ORDER OF BUSINESS)

PRESIDING OFFICER TO ASSUME CHAIR

Rule 5.01. The presiding officer shall take the chair at the hour to which the Senate last adjourned.

QUORUM

Rule 5.02. Two-thirds of all the Senators elected shall constitute a quorum, but a smaller number may adjourn or recess from day to day and compel the attendance of absent members (Constitution, Article III, Section 10). In case a less number shall convene, the members present may send the Sergeant-at-Arms or any other person or persons for any or all absent members.

ABSENCES

Rule 5.03. No member shall absent himself or herself from the sessions of the Senate without leave unless the member be sick or unable to attend.

CALL OF THE SENATE

Rule 5.04. It shall be in order to move a call of the Senate at any time to secure, to maintain, or to secure and maintain a quorum for the following purposes:

(1) for the consideration of a specific bill, resolution, or other measure;

(2) for a definite period of time or for the consideration of any particular class of bills.

When a call of the Senate is moved for one of the above purposes and seconded by five members and ordered by a majority of those present, the Doorkeeper shall close the main entrance to the floor of the Senate. All other doors leading from the floor of the Senate shall be locked and no member shall be permitted to leave the Senate without written permission of the presiding officer until after the subject matter upon which the call was ordered has been disposed of. The Secretary shall call the roll of members and note the absentees. Those for whom no sufficient excuse is made, by order of the majority of those present, may be sent for and arrested wherever they may be found and their attendance secured and retained by the Sergeant-at-Arms or officers appointed by the Sergeant for that purpose. The Senate shall determine upon what conditions they shall be discharged. Members who voluntarily appear shall, unless the Senate otherwise directs, be immediately admitted to the floor of the Senate, and they shall report their names to the Secretary to be entered upon the journal as present. Until a quorum appears, should the roll call fail to show one present, no

business shall be done except to compel the attendance of absent members or to adjourn.

When a quorum is shown to be present, the Senate may proceed with the matters upon which the call was ordered or may enforce and await the attendance of as many of the absentees as it desires to have present. If the Senate decides to proceed, the Sergeant-at-Arms shall not be required to bring in other absentees unless so ordered by a majority vote of the Senate.

* * * * *

ORDER OF CONSIDERING BILLS AND RESOLUTIONS

Rule 5.09. At the conclusion of the morning call, the Senate shall proceed to consider business on the President's table, which shall be disposed of in the following order:

(1) special orders;

(2) unfinished business;

(3) Senate Joint Resolutions;

(4) Senate Resolutions;

(5) Senate Concurrent Resolutions;

(6) Senate bills on third reading;

(7) Senate bills on second reading;

(8) House Joint Resolutions;

(9) House bills on third reading;

(10) House bills on second reading;

(11) House Concurrent Resolutions.

The above order is for Senate bill days, except as modified by any Joint Rules.

HOUSE BILL DAYS

Rule 5.10. On calendar Wednesday and calendar Thursday of each week, House Joint Resolutions and House bills on special order and on third and second readings, respectively, and House Concurrent Resolutions shall be taken up and considered until disposed of; provided in case one should be pending at adjournment on Thursday, it shall go over until the succeeding calendar Wednesday as unfinished business.

SPECIAL ORDERS

Rule 5.11. (a) Any bill, resolution, or other measure may on any day be made a special order for a future time of the session by an affirmative vote of two-thirds of the members present.

(b) A special order shall be considered at the time for which it is set and considered from day to day until disposed of, unless at the time so fixed there is pending business under a special order, but such pending business may be suspended by a two-thirds vote of all the members present. If a special order is not reached or considered at the time fixed, it shall not lose its place as a special order. All special orders shall be subject to any Joint Rules and Rule 5.10.

(c) Upon the affirmative vote of four-fifths of the members present, a special order may be reset to an earlier time than previously scheduled.

REGULAR ORDER OF BUSINESS

Rule 5.12. (a) Bills and resolutions shall be considered on second reading and shall be listed on the daily calendar of bills and resolutions on the President's table for second reading in the order in which the committee reports on them are received by the Senate. Upon the filing of a committee report on a bill or resolution as provided by Rule 11.12, the Secretary of the Senate shall note the date and time the report was filed. The Journal Clerk shall record the order in which the committee report was received in the Senate Journal for the day on which the Senate next convenes.

(b) Bills and resolutions shall be considered on third reading in the order in which they were passed on second reading.

SUSPENSION OF THE REGULAR ORDER OF BUSINESS

Rule 5.13. No bill, joint resolution, or resolution affecting state policy may be considered out of its regular calendar order unless the regular order is suspended by a vote of two-thirds of the members present.

* * * * *

ARTICLE VI

MOTIONS

MOTIONS AND THEIR PRECEDENCE

Rule 6.01. (a) When a question is under consideration by the Senate, no motion shall be made except:

(1) to fix the day to which the Senate shall adjourn or recess;

(2) to adjourn or recess;

(3) to proceed to the transaction of executive business;

(4) the previous question;

(5) to lay on the table;

(6) to lay on the table subject to call;

(7) to postpone to a time certain;

(8) to commit;

(9) to amend;

(10) to postpone indefinitely.

These several motions have precedence in the order named. It shall be in order to make any number of the above motions before any vote is taken, but the votes shall be taken on all such motions made in the order of the precedence above stated.

(b) Upon compliance with pertinent Senate Rules, motions addressing House amendments to Senate bills, resolutions suspending the constitutional limitation on spending, resolutions suspending conference committee limitations, appointment of conference committees, and conference committee reports are privileged and may be taken up at any time when no other matter is pending before the Senate.

LIMITATION OF DEBATE ON MOTIONS

Rule 6.02. No debate shall be allowed on a motion to lay on the table, for the previous question, or to adjourn or recess; provided, however, that the author of a measure or whichever one of the several authors of the same may be by them selected so to do shall have the right, when a motion to lay on the table shall have been made, to close the debate, which privilege the member may yield to any other Senator subject to all of the Rules of the Senate.

* * * * *

PAIRED VOTES

Rule 6.17. If a member who is absent desires to be recorded on a pending question, the member may cast a paired vote by signing a pair slip which indicates the member's "yea" or "nay" vote with a member who is present and casting an opposite vote, if the member who is present so desires. Pair slips must be signed by both the absent and present member and filed with the Secretary of the Senate before the vote. The paired votes of the present and absent members shall be recorded as an expression of opinion on the matter considered but shall not be counted in the total of votes for or against the measure or motion. However, the member present shall be counted to make a quorum.

LIEUTENANT GOVERNOR TO GIVE CASTING VOTE

Rule 6.18. If the Senate be equally divided on any question, the Lieutenant Governor, if present, shall give the casting vote. (Constitution, Article IV, Section 16)

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ARTICLE XVI

VOTES REQUIRED TO ADOPT MOTIONS

MATTERS REQUIRING VOTE OF TWO-THIRDS OF MEMBERS OF SENATE

Rule 16.05. A vote of two-thirds of the members of the Senate shall be required for:

(1) final passage of proposed amendment to the Constitution; Rule 10.02 (Constitution, Article XVII, Section 1)

(2) immediate effect of a bill; (Constitution, Article III, Section 39)

(3) the release of payment of taxes in cases of great public calamity; (Constitution, Article VIII, Section 10)

(4) final passage of bills to reduce county to less area than 900 square miles; (Constitution, Article IX, Section 1)

(5) passage of an address to the Governor for the removal of any civil officer; (Constitution, Article XV, Section 8)

(6) expulsion of a member of the Senate; Rule 4.09 (Constitution, Article III, Section 11)

(7) passage of House bills that have been returned by the Governor with objections. Rule 6.20. (Constitution, Article IV, Section 14)

MATTERS REQUIRING VOTE OF TWO-THIRDS OF MEMBERS PRESENT

Rule 16.06. A vote of two-thirds of the members present shall be required to:

(1) impeach any officer; (Constitution, Article XV, Section 3)

(2) pass a Senate bill that has been returned by the Governor with objections; Rule 6.20 (Constitution, Article IV, Section 14) See note to Rule 6.20.

(3) confirm an appointee of the Governor, unless otherwise directed by law; (Constitution, Article IV, Section 12)

(4) adopt an amendment at third reading of a bill or a joint resolution; Rules 7.19 and 10.02

(5) suspend the floor privileges of a member of the Senate; Rule 4.07

(6) suspend the regular order of business; Rule 5.13

(7) excuse absentees; Rule 5.03

(8) set a matter for special order; Rule 5.11. See note to Rule 5.11.

(9) place a minority report on the calendar; Rule 11.17

(10) rerefer a bill to another committee; Rule 6.08

(11) suspend the section-by-section analysis on conference committee reports; Rule 12.10

(12) suspend or rescind any rule of the Senate unless the rules specify a different majority; Rule 22.01

(13) consider immediately petitions, concurrent and joint resolutions, or resolutions setting or defining legislative or state policy. Rule 8.02. See note to Rule 8.02.

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MATTERS REQUIRING VOTE OF MAJORITY OF MEMBERS PRESENT

Rule 16.08. A vote of the majority of members present shall be required to:

(1) elect officers; Rule 1.05

(2) elect a member to preside; Rule 1.01

(3) remove a member from the chair; Rule 4.08

(4) pass a bill on second reading; Rule 7.17

(5) pass a bill on third reading, except to give immediate effect to the bill as required by Rule 7.18;

(6) adopt an amendment on second reading;

(7) adopt a motion to reconsider vote; Rules 6.10 and 6.11

(8) dispense with reading of papers; Rule 6.13. See note to Rule 6.13.

(9) debate a congratulatory, memorial, or courtesy resolution; Rule 8.03. See note to Rule 8.03.

(10) adopt a motion for previous question, after five seconds; Rule 6.09. See note to Rule 6.09.

(11) adopt a motion for immediate ruling, after 10 seconds; Rule 6.12. See note to Rule 6.12.

(12) concur in House amendments to Senate bills, except to give immediate effect to the bill as required by Rule 16.05(2);

(13) adopt a Conference Committee Report, except to give immediate effect to the bill as required by Rule 16.05(2).

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ARTICLE XX

WHEN SENATE RULES ARE SILENT

PRESIDENT OF SENATE DECIDES QUESTION

Rule 20.01. The President of the Senate shall decide all questions not provided for by the standing Rules of Order of the Senate and Joint Rules of Order of both branches of the Legislature, according to parliamentary practice laid down by approved authors.

APPEAL TO SENATE

Rule 20.02. The President's ruling is subject to appeal to the entire Senate.

ARTICLE XXI

ADOPTION OF RULES

SENATE RULES

Rule 21.01. The Senate shall at the beginning of each Legislative Session adopt temporary or permanent Senate rules by resolution of the Senate. The Senate rules shall be adopted by a majority of the members of the Senate.

Appendix J

AFFIDAVIT OF PATSY SPAW

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Patsy Spaw, who is personally known to me to be the person subscribing her name below, and after being duly sworn by me according to law, on her oath deposed and stated:

"My name is Patsy Spaw, and I am the Secretary of the Senate and custodian of its records. I am over twenty-one and in all ways competent to swear out this affidavit. All information provided herein is within my personal knowledge and is true and correct."

"Under Senate Rule 5.12, bills are considered on second reading 'in the order in which the committee reports on them.' Under Rule 5.13, bills may be taken out of order when 'the regular order is suspended by a vote of two-thirds of the members present.'"

"Because of these rules, a bill is often introduced at the beginning of a session that is intended to be the first bill out of committee, with an informal understanding that the bill, usually on an innocuous subject, will not be voted upon by the full Senate. This bill is then known as a 'blocker bill' remains at the top of regular order, and following bills are then taken up on second reading after the regular order of business has been suspended by a two-thirds vote."

"Blocker bills receive no official designation by the Senate; whether or not a bill may be considered 'blocker bill' depends on the Senators' informal understanding or agreement. There is no prohibition against Senators' voting out or otherwise disposing of a purported 'blocker bill' and thus allowing subsequent bills to be taken up without a need to suspend the rules."

"Furthermore, whether or not a bill is treated by the Senate as a 'blocker bill' depends on the actions taken by many people. First, a Senator must introduce a bill that is not intended for actual passage. The committee considering the bill must then ensure that it is the first bill reported out of committee. Occasionally, a Senator will intend a bill to serve as a 'blocker bill' but the committee will not vote it out in time to be used as such. For example, in 1991, under Lieutenant Governor Bob Bullock, a bill intended to serve as a blocker bill was introduced in the Fourth Called Session of the 72nd Legislature. Although the bill was filed and referred to committee, it was never reported from committee. No other bill served the 'blocker bill' role."

"In some cases, bills that might otherwise have been 'blocker bills' have been voted out of the Senate or otherwise disposed of in order to avoid the need for a two-thirds vote to take subsequent bills out of order. For example, in 1961, under Lieutenant Governor Ben Ramsey, the Senate disposed of three House bills before reaching H.B. 533, relating to the Texas Liquor Control Act. One bill was postponed by unanimous consent, another was recommitted to committee, and the third was laid out and passed. H.B. 533 was then laid out on second reading without suspension of the regular order. It passed to a third reading on a voice vote with 14 senators recorded as voting no. Suspension of the three-day rule failed by a 14 to 14 vote."

"Sometimes a bill will not get the two-thirds vote to suspend the regular order, but will be passed later when it arrives at the top of the regular order of business. For example, on Tuesday, June 25, 1968, under Lieutenant Governor Preston Smith, an attempt was made to suspend the regular order of business to bring up H.B. 2, a tax bill, on second reading. The motion to suspend failed 14 to 16. The next day was a House Bill day, and H.B. 2 was first on the list of House Bills and was laid out before the Senate without a two-thirds suspension vote."

"Often, Senators will vote suspend the regular order of business even when they are not considering bills out of order. For example, in the Third Called Session of the 62nd Legislature, there was only one bill introduced. Nevertheless, the regular order of business was still suspended in order to take up the bill."

"Historically, according to the *Senate Journal* there were many times that the Senate did not recognize a 'blocker bill' and therefore did not suspend the regular order of business by a two-thirds vote when considering bills that were at the top of regular order. Instances where the Senate followed this practice occurred in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, the First Called Session of the 63rd Legislature, the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature."

Further, Affiant sayeth not.

____/s/_____
Patsy Spaw, Affiant

SUBSCRIBED TO AND SWORN BEFORE ME, on August 15, 2003, to certify which witness my hand and seal of office.

_____/s/_____
Notary Public in and for the State of Texas